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March 1, 2012

**VIA COURIER AND ECFS** ***EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

**Re:** ***Developing a Unified Intercarrier Compensation Regime*****;** ***Establishing Just and Reasonable Rates for Local Exchange Carriers*****;** ***Connect America Fund*****;** ***High-Cost Universal Service Support*****;** ***A National Broadband Plan for Our Future,*** **CC Dkt. No. 01-92, WC Dkt. Nos. 07-135, 10-90, & 05-337, GN Dkt. No. 09-51**

Dear Ms. Dortch:

On behalf of Cbeyond, Inc. ("Cbeyond"), EarthLink, Inc. ("EarthLink"), Integra Telecom, Inc. ("Integra"), and tw telecom inc. ("tw telecom), please find enclosed two copies of the redacted version of an *ex parte* letter ("the Joint CLECs' *Ex Parte* Filing") for filing in the above-referenced dockets. One machine-readable copy of the redacted version of the Joint CLECs' *Ex Parte* Filing will also be filed electronically via ECFS.

Pursuant to the *Protective Order* in this proceeding,[1] one original of the confidential version of the Joint CLECs' *Ex Parte* Filing is being filed with the Secretary's Office under separate cover. In addition, pursuant to the *Protective Order*, two copies of the confidential version of the Joint CLECs' *Ex Parte* Filing will be delivered to Lynne Hewitt Engledow of the Pricing Policy Division of the Wireline Competition Bureau.

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[1] *Developing a Unified Intercarrier Compensation Regime; Establishing Just and Reasonable Rates for Local Exchange Carriers; Connect America Fund; High-Cost Universal Service Support; A National Broadband Plan for Our Future,* CC Dkt. No. 01-92, WC Dkt. Nos. 07-135, 10-90, & 05-337, GN Dkt. No. 09-51, Protective Order, DA 10-1749 (rel. Sept. 16, 2010) ("*Protective Order*").

Please do not hesitate to contact me at (202) 303-1111 if you have any questions regarding this submission.

Respectfully submitted,

*/s/ Thomas Jones*
Thomas Jones
Nirali Patel

*Counsel for Cbeyond, Inc., EarthLink, Inc., Integra Telecom, Inc., and tw telecom inc.*

cc: Lynne Hewitt Engledow

Enclosures

REDACTED – FOR PUBLIC INSPECTION

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**Re:** ***Developing a Unified Intercarrier Compensation Regime*; *Establishing Just and Reasonable Rates for Local Exchange Carriers*; *Connect America Fund*; *High-Cost Universal Service Support*; *A National Broadband Plan for Our Future*, CC Dkt. No. 01-92, WC Dkt. Nos. 07-135, 10-90, & 05-337, GN Dkt. No. 09-51**

Dear Ms. Dortch:

Cbeyond, Inc. ("Cbeyond"), EarthLink, Inc. ("EarthLink"), Integra Telecom, Inc. ("Integra"), and tw telecom inc. ("tw telecom") (collectively, the "Joint CLECs"), through their undersigned counsel, hereby submit this letter in response to an *ex parte* letter filed by Frontier Communications ("Frontier") on February 23, 2012 in the above-referenced dockets.[1] In its letter, Frontier demonstrates that a flash cut of intrastate originating access rates for toll calls originating on the PSTN and terminating in IP (hereinafter, "PSTN-VoIP" calls) to interstate levels would have an adverse financial impact on Frontier.[2] Immediate reductions in intrastate originating access rates for PSTN-VoIP traffic would have a negative financial impact not only on mid-sized incumbent LECs such as Frontier, but also on competitive LECs such as the Joint CLECs. Specifically, if the Commission were to apply

[1] *See generally* Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 10-90 et al. (filed Feb. 23, 2012).

[2] *See id.* at 1-2.

interstate originating access rates to intrastate PSTN-VoIP calls, the Joint CLECs would experience estimated losses in their gross annual originating access revenues (excluding revenues from 8YY database query charges) as follows:

**[BEGIN CONFIDENTIAL]**

| Percentage VoIP Usage ("PVU") Provided | Cbeyond[3] | EarthLink[4] | Integra[5] | tw telecom[6] |
|---|---|---|---|---|
| 100% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 90% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 80% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 70% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 60% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 50% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 40% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 30% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 20% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 10% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |
| 0% VoIP Termination (Interstate) | [redacted] | [redacted] | [redacted] | [redacted] |

**[END CONFIDENTIAL]**

The loss of these revenues would make it more difficult for the Joint CLECs to adjust to the reductions in their terminating access revenues mandated by the *ICC/USF Reform Order*.[7] The Commission

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[3] These estimates are based on Cbeyond's 2011 intrastate originating access minutes.

[4] These estimates are based on EarthLink's January 2012 intrastate originating access minutes.

[5] These estimates are based on Integra's 2011 intrastate originating access minutes.

[6] These estimates are based on tw telecom's intrastate originating access minutes from July 1, 2010 to June 30, 2011.

[7] *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of

should therefore clarify that it did not intend to require LECs to reduce intrastate originating access charges for PSTN-VoIP traffic to interstate levels in the *ICC/USF Reform Order*.

Even if the Commission did intend to require immediate reductions in intrastate originating access rates for intrastate PSTN-VoIP calls, the Commission should reconsider its decision for several additional reasons. *First*, as the Joint CLECs explained in detail in their comments on the *ICC/USF Reform FNPRM*, the Commission does not have the statutory authority to reduce intrastate originating access rates.[8]

*Second*, as Frontier and Windstream have explained in support of their petition for clarification (and in the alternative, reconsideration),[9] if the Commission were to subject intrastate PSTN-VoIP calls to different (i.e., lower) originating access charges than intrastate PSTN-PSTN calls, interexchange carriers would have an increased incentive to misidentify the intrastate toll traffic they receive in order to minimize their intercarrier compensation liability.[10] This incentive to engage in regulatory arbitrage "would persist for an *indefinite* period of time until the Commission completes its further rulemaking."[11]

Moreover, although some parties argue that the Commission should reject the Frontier/Windstream Petition because it would create an asymmetry in which different originating access rates would apply to intrastate PSTN-VoIP calls and intrastate VoIP-PSTN calls,[12] that is no justification for the Commission to treat intrastate PSTN-VoIP calls differently from intrastate PSTN-PSTN calls and thereby create arbitrage opportunities. Furthermore, while the Commission "adopt[ed] a symmetrical framework for VoIP-PSTN traffic,"[13] that symmetrical approach focuses on terminating

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Proposed Rulemaking, FCC 11-161 (2011) ("*ICC/USF Reform Order*" or "*ICC/USF Reform FNPRM*").

[8] *See* Comments of Cbeyond, Inc., EarthLink, Inc., Integra Telecom, Inc., and tw telecom inc., WC Dkt. Nos. 10-90 et al., at 5-8 (filed Feb. 24, 2012).

[9] *See* Frontier and Windstream Petition for Reconsideration and/or Clarification, WC Dkt. Nos. 10-90 et al., at 21-29 (filed Dec. 29, 2011) ("Frontier/Windstream Petition").

[10] *See* Frontier and Windstream Reply to Oppositions to Petition for Reconsideration and/or Clarification, WC Dkt. Nos. 10-90 et al., at 12-13 (filed Feb. 21, 2012) ("Frontier/Windstream Reply").

[11] *Id.* at 13 (emphasis in original).

[12] *See* Comments of AT&T, WC Dkt. Nos. 10-90 et al., at 39 (filed Feb. 9, 2012); General Communication, Inc. Comments on Petitions for Reconsideration, WC Dkt. Nos. 10-90 et al., at 6-7 (filed Feb. 9, 2012); Comments of the National Cable & Telecommunications Association, WC Dkt. Nos. 10-90 et al., at 14 (filed Feb. 9, 2012).

[13] *ICC/USF Reform Order* ¶ 942.

access charges, not originating access charges. As the Commission has held, "[t]his symmetric approach means that 'providers that benefit from lower VoIP-PSTN rates when their end-user customers' traffic is *terminated* to other providers' end-user customers also are restricted to charging the lower VoIP-PSTN rates when other providers' traffic is *terminated* to their end-user customers.'"[14]

Finally, if the Commission does decide to flash cut intrastate originating access rates for PSTN-VoIP calls, the Commission should not allow incumbent LECs to recover the resulting lost revenues from the access recovery mechanism. As the Joint CLECs have explained, allowing additional subsidies for revenue recovery would (1) conflict with the Commission's goal of controlling the size of the Connect America Fund ("CAF"), (2) further distort the intercarrier compensation regime in favor of incumbent LECs; and (3) require competitive LECs to help pay for the additional subsidies to incumbent LECs in the form of universal service contributions.[15] USTelecom asserts that "the fact that the Commission has established a budget for the CAF . . . cannot justify denying appropriate recovery to an incumbent LEC for lost revenues associated with the potential elimination of originating intrastate access charges."[16] But the Commission considered its "commitment to keeping within the CAF budget" when deciding whether to allow incumbent LECs additional recovery for lost intercarrier compensation revenues (resulting from a potential flash cut to bill-and-keep for the exchange of CMRS-LEC intraMTA traffic)[17] and the Commission should do the same here. In addition, while USTelecom contends that the Joint CLECs can simply "recover lost access revenues from their end users,"[18] the Joint CLECs have already explained that competitive LECs enter into long-term contracts with many of their business customers, and the terms of such contracts generally prevent competitive

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[14] *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Order, DA 12-298, ¶ 2 (rel. Feb. 27, 2012) (quoting *ICC/USF Reform Order* ¶ 942) (emphasis added).

[15] *See* Comments of Cbeyond, EarthLink, Integra Telecom, and tw telecom, WC Dkt. Nos. 10-90 et al., at 5 (filed Feb. 9, 2012).

[16] *See* United States Telecom Association's Reply to Oppositions to Petition for Reconsideration, WC Dkt. Nos. 10-90 et al., at 10-11 (filed Feb. 21, 2012) ("USTelecom Reply").

[17] *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Order on Reconsideration, FCC 11-189, n.22 (rel. Dec. 23, 2011).

[18] USTelecom Reply at 11.

LECs from adjusting end-user customer rates to account for reduced intercarrier compensation revenues.[19]

Please do not hesitate to contact me at (202) 303-1111 if you have any questions or concerns about this submission.

Respectfully submitted,

/s/ *Thomas Jones*
Thomas Jones
Nirali Patel

*Counsel for Cbeyond, Inc., EarthLink, Inc., Integra Telecom, Inc. and tw telecom inc.*

[19] *See, e.g.*, Comments of Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., WC Dkt. Nos. 10-90 et al., at 6-7 (filed Apr. 18, 2011).